IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DAROLD R.J. STENSON, Plaintiff, v. ELDON VAIL, et al. Defendants.	No.08-2-02080-8 DECISION OF THE COURT
CAL COBURN BROWN and JONATHAN GENTRY, Plaintiffs, v. ELDON VAIL, et al. Defendants.	No. 09-2-00273-5 (consolidated with 08-2-02080-8) DECISION OF THE COURT

This matter came before the Court for trial on May 26, 2009. Closing argument was on June 2. The Court is today entering separately Findings of Fact and Conclusions of Law. The Decision of the Court follows.

Background

This is a civil action brought by three inmates awaiting imposition of sentence of death at the Washington State Penitentiary. The three cases have been consolidated for purposes of trial and stays of execution have been entered by other courts while this matter is resolved. All plaintiffs have exhausted all criminal appeals of their convictions and sentences. Plaintiffs are not challenging the death penalty statute, the constitutionality of the death penalty, or the legality of lethal injection as a means of execution. Instead, Plaintiffs allege that the method of administering lethal injection in the State of Washington subjects them to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and to cruel

punishment in violation of Article I, Section 14 of the Washington Constitution. A four day trial has been held in which the parties have presented evidence about the method of administering lethal injection in Washington and the likelihood that plaintiffs will suffer some form of harm as a result of misadministration of the death penalty.

United States Constitutional Claims

This case parallels *Baze v Rees*, ___ US ___, 128 S. Ct. 1520 (2008), in which the Kentucky method of lethal injection was challenged in a civil proceeding. The plurality opinion in that case was written by Chief Justice Roberts. The Court upheld the constitutionality of Kentucky's protocol. Excerpts of the Chief Justice's opinion that are relevant to this proceeding include the following:

> "... A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States. It is also the method used by the Federal Government....
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> "Of these 36 States, at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols.... The first drug, sodium thiopental ... is a fast-acting barbiturate sedative that induces a deep, coma-like unconsciousness when given the amounts used for lethal injection... The second drug, pancuronium bromide ... is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration.... Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.... The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs...." 128 S. Ct. 1520, 1527.

In Washington, the Superintendent of the Washington State Penitentiary, Stephen Sinclair, is charged with supervising the punishment of death. RCW 10.95.180. Washington uses a three drug combination similar to Kentucky for lethal injection. The Washington protocol is set forth at DOC 490.200 (Exhibit 1) and is patterned after the Kentucky protocol that passed review by the Supreme Court. Plaintiffs claim that Washington is not capable of administering the three drugs such that Plaintiffs will not be subject to "cruel and unusual" pain.

Chief Justice Roberts, in the plurality opinion of *Baze v Rees*, wrote on this subject as follows:

> "The Eighth Amendment to the Constitution ... provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted... Some risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions....
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> "This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.... In *Wilkerson v Utah* [a case upholding death by firing squad]... the Court cited cases from England in which 'terror, pain, or disgrace were sometimes superadded' to the sentence, such as where the condemned was 'embowelled alive, beheaded, and quartered,' or instances of 'public dissection in murder, and burning alive.'.... What each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain – 'superadd[ing]' pain to the death sentence through torture and the like." 128 S. Ct. 1520, 1529-1530.

As in this case, the Plaintiffs in v *Baze v Rees* were not claiming that lethal injection or the proper administration of the particular protocol

adopted in Kentucky would subject them to cruel and unusual punishment. Rather, the claim was that there is a significant risk that the procedures will not be properly followed, resulting in severe pain.

The Chief Justice in *Baze* discussed this claim as follows:

> "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual....
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> "... In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure gives rise to a 'substantial risk of serious harm.'
>
> "Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures....
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> "Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures.... Accordingly, we reject petitioners' proposed 'unnecessary risk' standard as well as the dissent's 'untoward' risk variation....
>
> "Instead, the proffered alternatives must effectively address a 'substantial risk of serious harm.' ... To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment....

"We agree with the state trial court and State Supreme Court, however, that petitioners have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified....

"...A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. *A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.*" 128 S. Ct. 1520, 1531-1537. [emphasis added]

As noted earlier, the Washington protocol was amended in 2008 after the *Baze* decision to follow the Kentucky protocol. The evidence presented at trial established some minor variations from Kentucky: e.g. the length of the tubing, the location of the injection team, the amount of sodium thiopental, the number of practice sessions for the team. Granting relief on this level of evidence places the Court in the role of a board of inquiry, as the Chief Justice warned. This Court finds that the Washington protocol is "substantially similar" to the Kentucky protocol and therefore does not result in cruel and unusual punishment under the Eighth Amendment.

Washington Constitutional Claim

The claim Petitioners present under the Washington Constitution is essentially the same claim as presented under the United States Constitution. Petitioners argue that the Washington Constitution requires a different result because the standard for a constitutional violation is different.

Article I, Section 14 of the Washington Constitution provides that:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

The cases interpreting this provision largely predate the case of *State v Gunwall*, 106 Wn.2d 54 (1986) and so do not apply the criteria prescribed in that case for determining if the Washington Constitution should be considered as extending broader rights to its citizens than does the United States Constitution. Justice Sanders, however, in his dissent in *State v Rivers*, 129 Wn.2d 697 at 733 (1996), did apply the analysis. In so doing he considered the differences between the state and federal language, a *Gunwall* factor:

> "Cruel and unusual" is relative, defined by comparing it to others. Cruel without unusual, on the other hand, requires a more absolute definition." *State v Rivers*, 129 Wn. 2d 697, 733.

In reviewing the textual language (a *Gunwall* factor) he went on to explain that "cruelty was generally understood to encompass two elements: (1) punishment beyond that which is necessary and (2) absence of mercy." 129 Wn.2d 697, 723.

In *State v Fain*, 94 Wn.2d 387 (1980), the Court did consider the differences in language between the state and federal provisions and the constitutional and common law history:

> "Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation." 94 Wn.2d 387,
>
> "The historical evidence reveals that the framers of Const. art. I, Sec. 14 were of the view that the word "cruel" sufficiently expressed their intent, and refused to adopt an amendment inserting the word "unusual". 94 Wn.2d

It seems clear, then, that Washington could extend broader protection to inmates under a *Gunwall* analysis than the United States Constitution provides. But in order to do so, the Court would need to find a meaningful difference between the intent of "cruel" as used by the framers of the Washington Constitution and "cruel and unusual" as used by the framers of the United States Constitution. Accepting Justice Sanders' understanding of "cruel" as an absolute term, the Roberts test of "a demonstrated risk of severe pain ... [the risk of which] is substantial when compared to the known and available alternatives" would be objective enough to provide an absolute standard as to what method of execution would rise to the level of "cruel". The fact that other states might use more or less humane methods would be irrelevant, under this analysis.

In previous decisions, the Washington Supreme Court has found death by hanging is not cruel punishment. *State v Frampton*, 95 Wn.2d 922 (1981). The Court made this finding despite evidence of hangings which had caused extreme pain and extended suffering.

In that case, Justice Rossellini remarked:

> "It is for the legislature, as the prescriber of the punishment for crime, to determine what method shall be used, in the absence of a definitive showing that unnecessary cruelty is involved. There is no such showing here." 95 Wn.2d 512

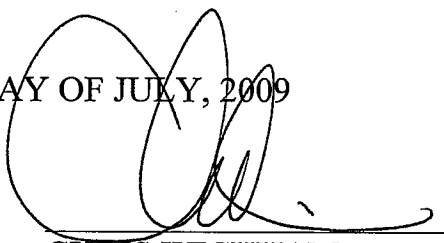
And Justice Stafford went further:

> "A law should not be declared unconstitutional just because one does not like it. It is only when a statute contravenes a constitutional provision or principle that it must be invalidated. "The majority say hanging is cruel and unusual punishment because it offends civilized standards of decency. This is purely subjective reaction, however. The legislature is mentally and morally as well attuned as the members of this court to

> precisely determine the point at which civilization is in the 'evolving standard of decency' or where such punishment fits in. In a case such as this wherein wholly subjective observations and reasoning are involved, we should defer to the legislature's judgment. The legislature is, after all, the body most closely representative of the people whose standards of decency are said to be impacted." 95 Wn.2d 478, 514.

At trial, Plaintiffs presented no evidence that Defendants intended to impose punishment that was "cruel". The procedure to be used by Defendants, although not fail-safe, appears to have been designed to administer the death penalty in a way that is humane for both the inmate and the observers. It is an attempt to provide some dignity to this most grave event. Accordingly, this Court cannot find that the Washington protocol as implemented by the State is "cruel" under the Washington Constitution. Petitioners' claims are denied.

DATED THIS 10TH DAY OF JULY, 2009



CHRIS WICKHAM
Judge, Thurston County Superior Court